

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LARRICK H. GLENDENING, and
VINCENT J. SCUILLA

Appeal No. 1997-2926
Application No. 08/376,299

ON BRIEF

Before GARRIS, WALTZ, and TIMM, Administrative Patent Judges.
WALTZ, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the examiner's refusal to allow claims 1 through 3 and 5 through 15 as amended subsequent to the final rejection (see the amendment dated Sep. 23, 1996, Paper No. 16, entered as per the Advisory Action dated Oct. 10, 1996, Paper No. 19).

Appeal No. 1997-2926
Application No. 08/376,299

Claims 1-3 and 5-15 are the only claims pending in this application.

According to appellants, the invention is directed to a method for treating an organic industrial waste to degrade the waste by growing microorganisms on site in a disposable bag supported in a containment unit (Brief, page 2). A copy of illustrative claim 1 is attached as an Appendix to this decision.

The examiner has relied upon the following references as evidence of obviousness:

Stone	4,058,213	Nov. 15, 1977
Knowlton	4,385,121	May 24, 1983
Clarke et al. (Clarke)	4,415,085	Nov. 15, 1983
Graves et al. (Graves)	4,786,192	Nov. 22, 1988
Dyadechko et al. (Dyadechko)	4,822,490	Apr. 18, 1989
Hoffman	4,994,391	Feb. 19, 1991
Mogna et al. (Mogna)	WO 90/02167	Mar. 8, 1990
(Published International Application)		

Claims 1-3, 5 and 7-14 stand rejected under 35 U.S.C. § 103 as unpatentable over Hoffman in view of Dyadechko, Stone, Mogna, Clarke and Graves (Answer, page 4). Claims 6 and 15 stand rejected under 35 U.S.C. § 103 as unpatentable over the references applied against claims 1-3, 5 and 7-14 further in

view of Knowlton (Answer, page 7).¹ We have carefully considered the opposing arguments in appellants' Brief and the examiner's Answer.² We reverse both of the examiner's rejections for reasons which follow.

OPINION

The examiner finds that the "Background" section of Hoffmann "discloses a method of treating organic industrial waste which is substantially the same as that instantly claimed." (Answer, page 4). The examiner further finds that one embodiment of the reference "involves transporting the bacteria in lyophilized form wherein the media/bacteria are reconstituted at the site of treating (See column 2, lines 1-15)." (*Id.*). The examiner states that the use of freeze-

¹The provisional final rejections of claims 1-3, 5 and 7-14 under § 103 over S.N. 07/834,771 in view of Dyadechko and claims 6 and 15 under § 103 over S.N. 07/834,771 in view of Dyadechko and Knowlton have been withdrawn in view of the amendment subsequent to the final rejection (see the Final Rejection dated July 11, 1996, Paper No. 15, pages 3-5, and the Advisory Action dated Oct. 10, 1996, Paper No. 19).

²We have also considered the record in related grandparent application 07/834,771, including the Decision of a merits panel of the Board of Patent Appeals & Interferences dated June 24, 1998, Paper No. 19, affirming the examiner's rejection of claims 1 through 37 under 35 U.S.C. § 103.

dried microorganisms "overcomes the shortcomings of a culture of microorganisms which are transported from the manufacture to the area of use in a liquid medium (See column 1, line 60 to column 2, line 3)." (Answer, page 9).

We do not agree that Hoffmann discloses or suggests "substantially the same" method as recited by the claimed subject matter. Hoffmann does not disclose or suggest that the use of freeze-dried microorganisms "overcomes the shortcomings" of transporting a liquid medium (see col. 1, ll. 60-68). Hoffmann merely discloses freeze-drying or lyophilizing as another technique presently used for preserving the activity of bacteria (col. 1, l. 68-col. 2, l. 3). Furthermore, Hoffmann does not disclose or teach transporting bacteria in lyophilized form wherein the bacteria are reconstituted at the treatment site (see the Answer, page 4). Hoffmann only discloses that a drawback of freeze-drying bacteria is that the "freeze-dried bacteria need to be rehydrated prior to achieving optimal activity." (Col. 2, ll. 13-15). Hoffmann is silent as to where the rehydration occurs. "Where the legal conclusion [of obviousness] is not

Appeal No. 1997-2926
Application No. 08/376,299

supported by facts it cannot stand." *In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967).

Additionally, Hoffman does not disclose or suggest the claimed limitation that the dried cells of a microorganism are admixed with a dried growth medium. Accordingly, the examiner has failed to identify any reason or suggestion as to why one of ordinary skill in the art would have used the growth medium of Dyadechko with the freeze-dried bacteria of Hoffman. *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999)(A showing of a reason, suggestion or motivation must be clear and particular). The remaining secondary references applied by the examiner do not overcome the deficiencies of the references discussed above.

For the foregoing reasons, we determine that the examiner has not met the initial burden of establishing a *prima facie* case of obviousness. See *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). Accordingly, the examiner's rejections of the claims on appeal are reversed.

The decision of the examiner is reversed.

REVERSED

Appeal No. 1997-2926

Application No. 08/376,299

Appeal No. 1997-2926
Application No. 08/376,299

No period for taking any subsequent action in connection
with this appeal may be extended under 37 CFR § 1.136(a).

REVERSED

BRADLEY R. GARRIS)	
Administrative Patent Judge)	
)	
)	
)	
)	BOARD OF PATENT
THOMAS A. WALTZ)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
CATHERINE TIMM)	
Administrative Patent Judge)	

lp

Appeal No. 1997-2926
Application No. 08/376,299

Ian C. McLeod
2190 Commons Parkway
Okemos, MI 48864

APPENDIX

1. A method for treating an organic industrial waste to degrade the waste, which comprises:

(a) providing dried cells of a microorganism which is anaerobic and can degrade the waste admixed with a dried growth medium for the microorganism containing an alkali metal nitrate in an amount between about 15 and 45 percent by weight of the growth medium in a sealed container with folds which collapses the container for shipment of multiple containers in a single box and with a closeable opening on the container, wherein the folds are horizontally opposite each other

(b) shipping the collapsed container near a site where the microorganism is to be introduced into the waste;

(c) providing the collapsed container in a containment means so that the folds are below the closeable opening and the folds engage the containment means as the container is filled;

(d) filling the container through the opening with water so as to unfold the container and to form a liquid growth medium from the dried growth medium admixed with the microorganism;

(e) holding the microorganism in the liquid growth medium in the container for a period of time of up to about 32 hours and at a temperature so that the microorganisms grow and increase in cell number and wherein the alkali metal nitrate and the microorganism inhibit any contaminant microorganisms in the liquid growth medium; and

(f) adding the microorganism along with the liquid growth medium to the industrial waste in a treatment plant, a lagoon, a tank or a soil, wherein the waste is degraded.

Leticia

Appeal No. 1997-2926

Application No. 08/376,299

APJ WALTZ

APJ TIMM

APJ GARRIS

DECISION: REVERSED

Send Reference(s): Yes No
or Translation (s)

Panel Change: Yes No

Index Sheet-2901 Rejection(s):

Prepared: August 14, 2001

Draft Final

3 MEM. CONF. Y N

OB/HD GAU

PALM / ACTS 2 / BOOK

DISK (FOIA) / REPORT